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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

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THE PEOPLE,

Plaintiff and Respondent,

v.

HERMAN HENRY ALBERS,

Defendant and Appellant.

C059928

(Super. Ct. No.  
MCYKCRBF071738)

In the middle of the night, while the 14-year-old victim was staying at defendant's house, defendant Herman H. Albers took the victim into the laundry room and engaged in sexual conduct with her. Defendant was charged with a lewd act upon a 14- or 15-year-old child and unlawful sexual intercourse with a minor who is under the age of 16. A jury found defendant guilty of the lewd act but was unable to reach a verdict as to unlawful sexual intercourse.

On appeal defendant argues the record does not contain substantial evidence to support the lewd act conviction because the victim's testimony "relied on her physically impossible

statements [about what happened] after the alleged sexual intercourse . . . ." We disagree and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On a December evening in 2005, the 14-year-old victim was staying at defendant's house in Siskiyou County visiting her friend, defendant's teenage stepdaughter. Sometime during the night, the victim went to the kitchen for some snacks. While she was in the kitchen, defendant approached her, took her by the hand, and led her to the laundry room.

At trial, the victim testified defendant took her into the laundry room, turned her around, pulled down her pajamas, bent her over, and had sex with her. The victim further testified that after the incident occurred, defendant "went over to the door that led outside and opened it and told me to go out that door. And when [my friend] asked what I was doing, I was supposed to say that I was outside waiting for my dad to bring me my clothes." The victim complied with defendant's request and reentered the house through the front door.

The victim did not report the incident to the police until June 2007. According to the transcript of her statement to the police, the victim said that on the night in question, "I went to the kitchen to get some snacks for us . . . and I went to the freezer in the laundry room."

During the victim's testimony at trial, she was shown a picture of the laundry room at defendant's house and asked if there was anything different about the photograph than what she remembered from the night of the incident in December 2005. The

victim replied that the "box next to the door" was not there. On cross-examination, the victim explained that the box she was referring to was an "icebox freezer." She testified that instead of the freezer, "there was a laundry basket in front of the door." Defense counsel confronted her with her earlier statement to the police about going to the freezer in the laundry room and asked the victim if her statements were truthful. The victim said they were, but she also said that she did not tell the police there was a freezer in the laundry room at the time of the incident. Defense counsel continued in cross-examination:

"Q: Now, isn't the reason you're concerned about that freezer being in front of the door is because you can't open the door with the freezer in front of it?

"A: Obviously.

"Q: So, if the freezer was there, it's your testimony you couldn't have exited that door, could you?

"A: No.

"Q: And you didn't exit that door, did you?"

"A: Yes, I did."

Defendant's wife also testified at trial. She testified that the freezer could only fit against the right-hand wall of the laundry room and that "with the freezer in place, you can't exit [the exterior door] without moving the freezer." She also testified that the freezer was in the laundry room in December 2005.

## DISCUSSION

"It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

[Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."" (People v. Allen (1985) 165 Cal.App.3d 616, 623.)

On appeal, defendant focuses only on the victim's testimony about facts occurring after the lewd acts occurred. He contends "[t]he evidence showing the laundry room door was blocked by the laundry room freezer was undisputed." Defendant further contends that "[t]he freezer's position blocking the door makes the [victim's] testimony physically impossible." Because, he argues, this part of the victim's testimony was not believable, we must disregard all of the victim's testimony and conclude "the record does not provide solid and substantial evidence to support the conviction for lewd and lascivious conduct."

Defendant's argument falters on its initial premise -- that there was undisputed evidence showing the door from the laundry room to the outside was blocked by a freezer in December 2005.

Certainly defendant's wife testified the freezer was in the laundry room in December 2005, and there was also evidence the victim originally told the police she went to the freezer in the laundry room on the night of the incident. At trial, however, the victim testified that she did not tell the police that the freezer was in the laundry room, and she further testified that the freezer was not there that night; instead, a laundry basket was. The jurors were under no obligation to believe defendant's wife, who had an obvious motive to lie, nor were they obligated to believe what the victim may have told the police originally. Instead, the jurors could have chosen to believe the victim's trial testimony that a laundry basket, and not a freezer, was all that was in front of the door on the night of the incident. Because it is not physically impossible for the victim's trial testimony to be true, we reject defendant's impossibility argument.

Even if this portion of the victim's trial testimony were not believed, the jury could still have believed the remainder of her testimony -- the facts relating the lewd act itself, which would provide substantial evidence in support of the jury's verdict. The jury was instructed with CALCRIM No. 226 as follows: "if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest".

The remainder of defendant's argument consists of pointing out other "inconsistencies and contradictions" bearing on the

victim's credibility.<sup>1</sup> Because we cannot engage in reweighing the credibility of the witnesses or evidence (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429) these points are of no consequence.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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SCOTLAND, P. J.

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BUTZ, J.

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<sup>1</sup> Defendant emphasizes five reasons the court should doubt the victim's credibility: (1) inconsistencies between the victim's testimony and another witness's testimony; (2) inconsistencies between the victim's testimony and her medical records; (3) the victim's 18-month delay in reporting the incident; (4) the briefness of the victim's descriptions of the sexual encounter; and (5) the fact that the jury was hung on the charge of unlawful sex with a minor.